June 4, 1984

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: [redacted]

This is an appeal to the Board of Appellate Review from an administrative determination of the Department of State that appellant, [redacted], expatriated herself on May 18, 1967, under the provisions of section 349(a) (1) of the Immigration and Nationality Act by obtaining naturalization in Canada upon her own application. 1/

On December 15, 1969, the Department held that appellant had expatriated herself. On May 5, 1983, the appeal was entered. The first issue the Board is required to decide is whether the appeal was filed within the limitation prescribed by the applicable regulations, namely, within a reasonable time after appellant received notice of the Department's holding of loss of her nationality. We find the appeal untimely and therefore barred. We will dismiss it.

1/ Section 349(a) (1) of the Immigration and Nationality Act, 8 U.S.C. 1481, reads:

Sec. 349. (a) From and after the effective date of this Act a person who is a national of the United States whether by birth or naturalization, shall lose his nationality by --

(1) obtaining naturalization in a foreign state upon his own application, . . .

I

Appellant acquired United States nationality by her birth at [redacted], Pennsylvania on [redacted]. She attended St. Lawrence University and Teachers College, Columbia University. In 1951 she moved to Canada and two years later was granted landed immigrant status (admission for permanent residence). Appellant married a Canadian citizen in 1957. She obtained passports from United States diplomatic and consular establishments in Canada in 1959 and 1966.

On an unrecorded date, appellant applied for naturalization in Canada. 2/ She swore an oath of allegiance to the British Crown and declared that she renounced her previous nationality. 3/ She was granted a certificate of naturalization on May 18, 1967.

In a sworn questionnaire executed May 18, 1982, appellant explained why she became a Canadian citizen.

> I performed the act of naturalization voluntarily in order to vote for school trustees and to participate fully in the community and the country where it seemed my husband, who was a Federal Civil Servant, and our two children and I would live indefinitely.

In response to an inquiry made by the U.S. Embassy at Ottawa, the Canadian citizenship authorities informed the

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2/ In 1982, appellant told a U.S. consular officer at Ottawa that before she applied for naturalization she had inquired at the Embassy about the effect naturalization might have on her United States citizenship. She had been informed, she stated, that loss in her case would be automatic and that there was nothing she could do about it.

3/ The actual texts of the declaration and oath that appellant subscribed are not in the record, but the Board takes note that in 1967 applicants for naturalization were required by Canadian law and regulations (1) to renounce any previous nationality and (2) to swear to be faithful and bear true allegiance to the British Crown.

The form of oath is prescribed by the Canadian Citizenship Act of 1946, as amended. The form of declaration of renunciation was found in section 19(1) (b) of the Canadian Citizenship Regulations. The latter section of the regulations was declared ultra vires by the Federal Court of Canada in 1973.

Embassy on August 9, 1967, that appellant had become naturalized. Thereafter, on August 16, 1967, in compliance with section 358 of the Immigration and Nationality Act, the Embassy prepared a certificate of loss of nationality in appellant's name. 4/

The Embassy certified that appellant acquired United States citizenship at birth; that she obtained naturalization in Canada upon her own application; and thereby expatriated herself under the provisions of section 349(a) (1) of the Immigration and Nationality Act.

On August 26, 1967, the Department informed the Embassy that in view of the Supreme Court's decision in Afroyim v. Rusk, decided May 29, 1967, 5/ the Department was studying the effect of that decision on section 349(a) of the Immigration and Nationality Act, including obtaining naturalization in a foreign state. The Department added: "When a legal judgment is reached on the subject, further consideration will be given to [redacted] case."

In January 1969 the Attorney General issued a statement of interpretation of the effect of the Supreme Court's decision in Afroyim. In it he indicated, in substance, that under

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4/ Section 358 of the Immigration and Nationality Act, 8 U.S.C. 1501, reads:

Sec. 358. Whenever a diplomatic or consular officer of the United States has reason to believe that a person while in a foreign state has lost his United States nationality under any provision of chapter 3 of this title, or under any provision of chapter IV of the Nationality Act of 1940, as amended, he shall certify the facts upon which such belief is based to the Department of State, in writing, under regulations prescribed by the Secretary of State. If the report of the diplomatic or consular officer is approved by the Secretary of State, a copy of the certificate shall be forwarded to the Attorney General, for his information, and the diplomatic or consular office in which the report was made shall be directed to forward a copy of the certificate to the person to whom it relates.

5/ 387 U.S. 253 (1967).

Afroyim, expatriation would only result if the expatriating act was performed voluntarily and with the intention of relinquishing United States nationality. 6/

In light of the Attorney General's opinion, the Department instructed the Embassy on July 22, 1969, to write appellant to state that the Department was reviewing certain loss of citizenship cases in light of Afroyim, and to ask her to submit an affidavit detailing the circumstances surrounding her naturalization and the reasons therefor in order to enable the Department to determine whether she became a Canadian citizen with the intention of abandoning her allegiance to the United States. On July 29, 1969, the Embassy wrote to appellant to convey the Department's request. According to appellant, she received the letter in September 1969 after her return from a trip. She stated that she called the Embassy and discussed her case with a consular officer who invited her to come to the Embassy to execute an affidavit, as the Department had requested. On a date not disclosed by the record, appellant executed the affidavit. As she explained at the hearing on March 29, 1964:

> Now, I don't remember all the questions that were on the affidavit. It seemed like half a sheet of paper. I believe there were questions on two sides. But one question which I do remember was if I renounced allegiance to the United States, and I remember I definitely wrote "No." 7/

6/ 42 Op. Atty. Gen. 397 (1969).

7/ Transcript of Proceedings In The Matter of Joann Cordelia Mooney, Board of Appellate Review, March 29, 1984 (hereinafter referred to as "TR"). 13, 14.

Appellant may be confusing the affidavit she executed with a citizenship questionnaire which would have asked her certain questions designed to elicit whether she performed the expatriating act voluntarily and with the intent of relinquishing her United States citizenship.

There are no copies of either the affidavit or the questionnaire in the record.

Sometime in the Fall of 1969, the Embassy forwarded the citizenship questionnaire and appellant's affidavit to the Department. On December 15, 1969, the Department approved the certificate of loss of nationality that the Embassy had prepared two years earlier. Approval of the certificate constitutes an administrative holding of loss of nationality from which an appeal, properly and timely filed, may be brought to this Board.

The Department sent a copy of the approved certificate to the Embassy which, in accordance with the provisions of section 358 of the Immigration and Nationality Act, forwarded it to appellant on February 9, 1970. The record does not show whether the certificate was transmitted by a covering letter; appellant stated at the hearing that there was none.

Twelve years passed until there was any further recorded contact between appellant and the United States Government.

In March 1982 appellant wrote to the United States Embassy at Ottawa to state it had been suggested to her that she apply for a review of her citizenship case under the Afroyim decision. She admitted that she had become a Canadian citizen in 1967, but asserted that "it was never my intention to abandon allegiance to the United States.'' She completed a questionnaire in May to assist the Department in evaluating her case, and the consul concerned submitted a full report to the Department. On June 4, 1982, the Department informed the Embassy that it had reviewed appellant's case, and was of the view that the original holding of loss of nationality should stand. The Embassy was instructed to inform appellant of the procedures for taking an appeal to the Board of Appellate Review.

Appellant initiated the appeal in May 1983.

She contends that she never intended to transfer or abandon her allegiance to the United States by obtaining naturalization in Canada.

The Board did not ask the Department to submit a brief, but did request that it review the case record and submit any comments that seemed pertinent for the Board to consider. By memorandum dated August 24, 1983, the Department commented as follows:

> Inasmuch as the certificate of loss was approved in 1969, and appellant has put forward no compelling reason for the delay in pursuing an appeal, we believe the appeal is barred by the reasonable time requirement of 22 C.F.R. 50.60.
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> We have examined the record in the case. We note that the consular officer at Embassy Ottawa and the responsible office in the Department reviewed the case last year and concluded that there were no grounds for changing the position of the Department that appellant lost her citizenship by naturalization in Canada. Me see nothing in the record that would cause us to question that conclusion.

The oral hearing appellant requested was held on March 29, 1984.

II

Before we may proceed we must determine whether appellant's appeal was filed within the time limit prescribed by the applicable regulations.

In 1969 when the Department approved the certificate of loss of nationality the regulations governing appeals to this Board provided that a person contending that the Department's holding of loss of nationality in his case was contrary to law or fact might appeal to the Board of Appellate Review within a reasonable time after receipt of notice of the Department's holding. 8/

8/ Section 50.60, Title 22, Code of Federal Regulations (1967-1979) 22 CFR 50.60, provided:

> A person who contends that the Department's administrative holding of loss of nationality or expatriation in his case is contrary to law or fact shall be entitled, upon written request made within a reasonable time after receipt of notice of such holding, to appeal to the Board of Appellate Review.

In 1979 the regulations applicable to the Board's activities were revised and amended. The time limit on appeal is now within one year of approval of a certificate of loss of nationality. 9/

Since the current regulations came into effect long after appellant was held to have expatriated herself, we are of the view that the current limit on appeal should not govern in this case, but rather the limitation of "reasonable time" in effect in 1967 is properly applicable.

Under the limitation of "reasonable time," a person who contends that the Department's determination of loss of nationality in his case is contrary to law or fact must file his request for review within a reasonable time after notice of such determination. Accordingly, if a person did not initiate his or her appeal to the Board within a reasonable time after notice of the Department's determination of loss of nationality, the appeal would be barred and the Board would lack jurisdiction to consider it. The reasonable time provision is mandatory and jurisdictional. 10/

9/ Section 7.5(b), Title 22, Code of Federal Regulations, (1979), 22 CFR 7.5(b) provides:

A person who contends that the Department's administrative determination of loss of nationality or expatriation under Subpart C of Part 50 of this chapter is contrary to law or fact, shall be entitled to appeal such determination to the Board upon written request made within one year after approval by the Department of the certificate of loss of nationality or a certificate of expatriation.

10/ The Attorney General in an opinion rendered in the citizenship case of Claude Cartier in 1973 stated:

> The Secretary of State did not confer upon the Board [of Appellate Review] the power to...review actions taken long ago. 22 C.F.R. 50.60, the jurisdictional basis of the Board, requires specifically that the appeal to the Board be made within a reasonable time after the receipt of a notice from the State Department of an administrative holding of loss of nationality or expatriation.

Office of Attorney General, Washington, D.C. File: CO-349-P, February 7, 1973.

The Chairman of the Board of Appellate Review in a letter dated May 24, 1983, apprised appellant of the jurisdictional issue presented by her appeal.

The rule on reasonable time has been exhaustively defined. 11/

How long is a "reasonable time" depends on the facts of each case. It is such length of time as may fairly be properly and reasonably allowed or required, having regard for the nature of the act or duty, or the subject matter, and the attending circumstances. It has been held to mean as soon as the circumstances of the parties will permit, but a person may not determine a time suitable to himself. Whether an appeal has been filed within a reasonable time depends, among other things, on whether a legally sufficient reason has been presented for any delay. A protracted and unexplained delay, particularly one that is prejudicial to the interests of the opposing party, is generally fatal.

The rationale for allowing a reasonable time to bring an appeal is that one should be permitted sufficient time to prepare a case showing that the Department's holding of loss of nationality is contrary to law or fact. At the same time, the rule presumes that one will prosecute an appeal with the diligence of a reasonably prudent person. Reasonable time begins to run from the time an appellant received notice (or may be presumed to have received notice) of the Department's holding of loss of nationality -- not sometime later when for whatever reason the person is moved to seek restoration of his or her citizenship.

Appellant submits that she did not appeal until many years after she was held to have expatriated herself because she had been led to believe that she had no grounds to appeal until informed differently in 1982; and because she had not until recently been aware that there was a right of appeal to this Board.

11/ See generally Chesapeake and Ohio Railway v. Martin 293 U.S. 209 (1931); Ashford v. Steuart, 657 F. 2d 1053 (1981); In re Roney, 139 F. 2d 175 (1943); Dietrich v. U.S. Shipping Board Emergency Fleet Corp., 9 F. 2d 733 (1926); Smith v. Pelton Water Wheel Co., 151 Ca. 393 (1907); Appeal of Syby, 460 A. 2d 749 (1961); Black's Law Dictionary, 5th Ed.; 36 Words and Phrases (1962).

She stated at the hearing that in 1969 when she discussed her case at the Embassy, a consular officer had told her that her reason for obtaining Canadian citizenship, namely, to vote and be active in the affairs of the community "was not a reason to retain my American citizenship." He further stated, according to appellant, that "...I would have no appeal." 12/ Appellant continued: "It is very firmly fixed in my mind that there was no question as to the status I had and that there was no appeal to that status." 13/

After appellant received the certificate of loss of nationality,

> "...periodically, I would say every two or three years, I would be in touch with the American Embassy or Consulate by phone and ask if there had been any changes in the law. Once I went in, and I was always told "no." 14/

Appellant further stated at the hearing that she first learned she had a right of appeal to this Board irrespective of whether she had grounds for appeal, in March 1982. 15/ She replied negatively when asked whether she was given any indication at any time during the years she inquired at the Embassy that she might initiate an appeal. 16/ And she pointed out that in 1970 when she received the certificate of loss of nationality, there was no covering letter giving information regarding the right of appeal to this Board. 17/ It was only in March 1982, appellant maintains, that she was informed by a consular official that she might have grounds for a review of her case under the Supreme Court's holding in Afroyim (supra). As the consular officer who interviewed her in March 1982 reported to the Department, appellant claimed she had been advised even before she became naturalized in 1967 that she

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12/ TR 13.

13/ Id.

14/ TR 14.

15/ TR 33.

16/ Id.

17/ TR 41.

would automatically lose her nationality by naturalization, and that although she periodically asked the Embassy whether there had been any changes in U.S. citizenship law, she had always been told "no"; therefore she did not appeal until 1983.

We are unable to consider appellant's explanation of the long delay in bringing this appeal legally sufficient to excuse her failure to act decisively before she finally did so in 1982.

We are prepared to accept appellant's contention that periodically she inquired of U.S. authorities in Ottawa whether there was a basis for her case being reconsidered, although no record of such inquiries exists. But we do not know what questions appellant posed to the Embassy; nor do we know what answers she may have received. It is possible that the official to whom appellant says she spoke regularly gave her a discouraging estimate of the possibilities that the holding of loss of her nationality might be overturned, and that appellant reacted passively, deferring to official authority.

In any event, it is clear that appellant did not attempt to confirm whether the advice she allegedly received from the Embassy was valid. She conceded at the hearing that she did not consider obtaining outside legal advice because: "I really didn't have very much money to go and see a lawyer anyway, and there are no lawyers anyway in Ottawa that would help me." 18/

She added:

> I made a very in-depth inquiry this time when I wanted to get some help, and there is absolutely no one that knows anything about this kind of thing at all outside of the Embassy. 19/

There were, of course, ways other than by retaining expensive legal counsel in which appellant could have learned that she might have grounds for an appeal and that this Board existed to hear such appeals. Unfortunately, she apparently considered none of them. We must conclude therefore that

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18/ TR

19/ Id.

she failed to use due diligence in ascertaining how she might contest her loss of citizenship.

The Board notes that contrary to long-standing internal instructions to consular officers, the Embassy failed to inform appellant in February 1970, when it sent her the certificate of loss of nationality, that she might bring an appeal to this Board. 20/ We do not, however, consider this lapse material error. The Department's instructions regarding notice of a right of appeal to consuls were internal guidelines only, and did not at that time have the force of law. 21/ Furthermore, it is hard to imagine that over the many years appellant allegedly inquired about possible recourse, no consular officer ever once mentioned that a Board of Appellate Review existed to which appellant could bring an appeal.

However sympathetically we may look at appellant's ostensible dilemma about what she might do to protest her loss of citizenship, we cannot regard her stated reasons for failing to bring an appeal until some thirteen years had passed as justifying such a protracted delay.

Appellant's friend and witness, an eminent attorney, observed at the hearing that courts today have opened up and try to do substantial justice; in effect, he argued that the Board should be flexible in its interpretation of the stricture of "reasonable time."

Under the regulations, however, the Board has no latitude to consider the merits of an appeal unless it first determines that the appeal was filed within the applicable limitation. Here, there has been an insufficiently explained or justified delay of thirteen years in bringing the appeal. By any objective standard such a delay is unreasonable. Due diligence in contesting loss of nationality is required to invoke the powers of this Board. Regretably, appellant here has failed to show such diligence.

20/ 8 Foreign Affairs Manual 224.21.

21/ It was not until 1979 that the Code of Federal Regulations (22 CFR 50.52) prescribed that an expatriate must be informed of the right of appeal when an approved certificate of loss of nationality is forwarded to him or her.

It is generally accepted that the primary purpose of a limitation on appeals is to compel the exercise of one's rights while the recollection of events is still fresh in the minds of both the moving and the opposing parties. More than thirteen years have passed since appellant became a Canadian citizen and was found thereby to have expatriated herself. It would be extremely difficult for the Department to carry its statutory burden of proving that appellant intended to expatriate herself in **1967**. There is nothing in the official record that would corroborate or refute her allegations that she lacked the requisite intent at the relevant time. The consular and departmental officials who were involved in **1967-1969** might or might not be available to testify; even if they were, it is highly unlikely that they would be able to recall the circumstances of appellant's case.

We are unable to deem appellant's reasons for not bringing an earlier appeal sufficient as a matter of law, and we perceive no obstacle beyond her control to filing a prompt appeal.

Since her delay in seeking a review of her case was, in our judgement, unreasonable, the Board lacks jurisdiction to entertain the appeal. Accordingly, we have no option but to dismiss it, and hereby so do.

Given our disposition of the case we are unable to reach the other issues presented.

Alan G. James, Chairman

J. Peter A. Bernhardt, Member

George Taft, Member